

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Sean Ahern

v.

Civil No. 04-cv-474-SM

United States of America

**O R D E R**

Although his pleading is styled "Independent Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)(2)(3)," in substance Sean Ahern is seeking federal habeas relief under 28 U.S.C. § 2255. In fact, he raises issues in his "Independent Motion" identical to those previously raised in the § 2255 petition he filed in Ahern v. United States, Civil No. 04-cv-474-SM. Relief was denied in that case, and both this court and the court of appeals denied a certificate of appealability. See 28 U.S.C. § 2253(c)(1); Ahern v. United States, No. 05-1762 (1st Cir., September 21, 2005).

Ordinarily, a Rule 60(b) motion in a habeas case should be treated as a second or successive habeas petition, particularly when the factual predicate of the motion challenges the

constitutionality of petitioner's underlying conviction. Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003). As this pleading is properly treated as a "second or successive application" for habeas relief, Ahern must first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A); United States v. Barrett, 178 F.3d 34 (1st Cir. 1999). Although transfer of this matter pursuant to 28 U.S.C. § 1631 is not mandated, requiring petitioner to refile the same pleadings in the court of appeals seems like an unnecessary imposition.

Accordingly, the court hereby transfers this matter to the United States Court of Appeals for the First Circuit to permit petitioner to seek an order allowing a second or successive petition under § 2244(b)(3).

**SO ORDERED.**

  
Steven J. McAuliffe  
Chief Judge

December 5, 2005

cc: Sean Ahern, pro se  
Donald A. Feith, Esq.